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NO. 80-990

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

CLARENCE E. CABELL, in his official capacity as Acting Chief Probation Officer of Los Angeles County; JACQUALINE HASEN-STAB, in her official capacity as Personnel Officer of the Los Angeles County Probation Department; GORDON T. NESVIG, in his official capacity as Chief Personnel Officer of the County of Los Angeles; and the COUNTY OF LOS ANGELES, a body politic;

Appellants,

vs.

JOSE CHAVEZ-SALIDO, RICARDO BOHORQUEZ, and PEDRO LUIS YBARRA,

Appellees.

On Appeal from the United States District Court for the Central District of California

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Amicus Curiae Brief in Support of Respondents

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I.

INTEREST OF AMICUS CURIAE[1/]

Amicus curiae have obtained the consent of the appellants and appellees for the filing of this brief. Amicus curiae the League of United Latin American Citizens (LULAC) is the largest and oldest Hispanic civil rights organization in the United States. LULAC has chapters and members located throughout the United States, including California. Many members of LULAC are lawful permanent immigrants residing in California who will be immediately affected by the outcome of this case. Amicus curiae the Farm Labor Organizing Committee (FLOC) will be affected by the

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1/ Pursuant to Rule 36.5, Rules of the Supreme Court of the United States, amicus curiae will only set forth the interest of amici, summary of the argument, the argument and a conclusion.

by the outcome of this case. Amicus curiae the Farm Labor Organizing Committee (FLOC) is a farm-worker union which organizes workers regardless of their alienage or immigration status. Members of FLOC will be affected by the outcome of this case. Amicus curiae the Social Justice Commission (Archdiocese of San Francisco) provides services and assistance to lawful permanent resident immigrants who will be immediately affected by the outcome of this case. Amicus curiae the National Center for Immigrants' Rights (NCIR), is a national resource center on immigration matters representing hundreds of organizations which have members or assist clients who will be directly impacted by the disposition of this case.

II.

SUMMARY OF ARGUMENT

(1) The alienage-employment restriction cases decided by this Court before

Foley v. Connelie, 435 U.S. 291, 98 S.Ct. 1065 (1978) and Ambach v. Norwick, 441 U.S. 68, 995 S.Ct. 1589 (1979), did not entail the exhaustive factual examinations found in the latter two cases into the precise responsibilities possessed by persons occupying the job categories in question. A new analytic framework was developed in Foley and Ambach wherein the Court first examined the nature of the job classification, and then determined the appropriate level of scrutiny to be applied. The trial in this case, held before issuance of the Foley and Ambach decisions, took only one day, Chavez-Salido v. Cabell, 427 F.Supp. 158, 161 (C.D.Cal. 1977) (Three Judge Court), and was "tried on stipulated facts." Chavez-Salido v. Cabell, Case No. 76-541-IH (C.D. Cal. June 4, 1980) (Civil Minutes at 73). Upon rehearing following vacation and remand by this Court, the trial court denied plaintiffs' "request for further discovery on the issue of the duties and responsibilities of

Deputy County Probation officers. . ." Ibid.

In light of the searching factual inquiries conducted in Foley and Ambach, it was error to deny further discovery in this case. At this point in the litigation, only evidence extrinsic to the record can establish the precise nature of the jobs in question here. The present record is totally inadequate for purposes of reaching a reasoned decision in this case, the disposition of which will substantially impact tens of thousands of immigrant workers and their families. The appropriateness of California's laws, which seek to exclude lawful permanent resident immigrants from many job categories, cannot be carefully evaluated in light of Foley and Ambach because the record contains only the parties' conflicting assertions on the nature of the job categories in question.

The record in this case does not sup-

port plenary review at this time. Given the far-reaching consequences that would accompany a disposition on the merits, amicus curiae urges that the judgment of the district court be vacated and the matter remanded for further factual development.

(2) A State may not exclude non-citizens from public employment by way of a statute which sweeps indiscriminately, without regard for the differences in the job classifications involved. The California statutes at issue here exclude non-citizens from a wide variety of jobs, many of which do not involve the performance of significant governmental functions and are not within the concept of a political community which can be legitimately restricted to citizens.

III.

ARGUMENT

(1) The District Court Judgment

Should be vacated and Remanded

There are approximately 1,300,00 lawful permanent resident immigrants residing in California. 1979 Annual Report of the Immigration & Naturalization Service, Table 4, p. 19. Disposition of this case will have a substantial impact on the ability of permanent resident immigrants in California and ultimately throughout the country to obtain employment. Despite the profound importance of this case, it comes to this Court in a factual vaccum. Amici believe that the paucity of the record makes meaningful review of the challenged statutes difficult, if not impossible. The district court judgment should be vacated and remanded for further factual inquiry.

This Court made clear for the first time in Foley and Ambach that the threshold examination in state-imposed citizenship public-employment restrictions would focus on whether excluded job classifications involve significant governmental

functions. Foley v. Connelie, supra, at 1074; Ambach v. Norwich, supra, at 1596. The outcome of this initial analysis in turn would determine the appropriate level of scrutiny to be applied. Ibid.

In Ambach, which held that school teachers are within the political community, the Court appeared to rest its analysis upon the important policy and governmental functions which public school teachers perform. The Court reviewed the precise functions of public school teachers, including the promotion of civil virtues, their serving as role models, and their influence over students' attitudes towards government and the political process. 441 U.S. at 78-80. In Foley the Court specifically expressed its obligation to "examine each [job classification] in question to determine whether it involves discretionary decision-making, or execution of policy, which substantially affects members of the

political community." 435 U.S. at 296. The Court reviewed and discussed the "variety of discretionary powers" held by New York State Troopers. 435 U.S. at 297.

In contrast, the record in this case is remarkably barren in terms of the precise nature of the job classifications which preclude non-citizen public employment under California Government Code Section 1031(a). The trial in this matter lasted only one day. Chavez-Salido v. Cabell, supra, 427 F.Supp. at 161. The case was tried on "stipulated facts" which virtually ignored the nature of the many job classifications involved in this litigation. Chavez-Salido v. Cabell, supra, Civil Minutes (July 6, 1978) at 73. While the case may have been tried on a summary record of "stipulated facts", the parties now offer widely divergent views on the actual role of probation officers in the criminal justice system, and have virtually nothing to

offer concerning the nature of the many other job classifications included in the challenged statute. Upon rehearing following vacation and remand of the district court judgment, that court denied plaintiffs' request "for further discovery on the issue of the duties and responsibilities of Deputy County Probation officers . . ." Ibid.; Joint Appendix ("J.A.") at 73.

At this point in the litigation, only evidence extrinsic to the record can establish the precise nature of the job classifications in question here. In short, this Court would have to reach beyond the record in order to make the initial determination of whether the job categories at issue here fall within the political community. Foley v. Connelie, supra, 435 U.S. at 296-97. In turn, this factual examination is critical to a determination of what standard of scrutiny will apply. Id., 435 U.S. at 295-96; Ambach v. Norwich,

95 S.Ct. at 1596.

This Court frequently vacates and remands cases in which the factual record is inadequate for a reasoned disposition. See, e.g., Truit Payne Co., Inc., v. Chrysler Motors Corp., ___U.S.___, 49 U.S.L.W. 4516, 4519 (May 18, 1981) ("the proper course is to remand the case so that the Court of Appeals may pass upon respondents' contention that the evidence adduced at trial was insufficient to support a finding of violation of the Robinson-Patman Act. . .") Amicus curiae believe that "a remand for further factual development" is required in this case. Coopers and Lybrand v. Livesay, et al., 437 U.S. 463, 473 (1978). The Court cannot reasonably decide the legal questions involved here because the record contains "only the parties' conflicting assertions" concerning the precise parameters of a probation officer's job. Mayer v. City of Chicago, 404 U.S. 189, 199 (1971) (case va-

cated and remanded). This record is "devoid of facts which would have permitted a reasoned judgment. . . [A] remand is necessary to permit further hearings to be held." Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 440-41 (1968). At this point "[o]nly evidence extrinsic to the record" can establish the justification for the challenged statutory scheme. Henry v. Mississippi, 379 U.S. 443, 452 (1964). The plaintiffs' request to pursue and present additional facts should have been granted. Czaplicki The Hoegh Silvercloud, et al., 351 U.S. 525, 534 (1956).

(2) The Challenged California Statutory Scheme Sweeps Too Broadly

Footnote 5 of the Foley opinion, 435 U.S. at 296, reaffirms the continued validity of the overbreadth criterion announced earlier in Sugarman v. Dougall, 413 U.S.

634, 643 (1973):

> This is not to say, of course, that a State may accomplish this end with a citizenship restriction that "sweeps indiscriminately", [citing Sugarman] without regard for the differences in the positions involved.

The challenged statutory scheme sweeps indiscriminately against lawful permanent residents and results from a long California history of discrimination against non-citizens.

(a) History of California Discrimination Against Immigrant Communities

As early as 1879 the Constitution of California provided that no corporation formed under the laws of the State shall in any capacity employ any Chinese or Mongolian. (Art. XIX, § 2, Constitution of

1879.) In 1880 the State Legislature passed an ordinance making it a criminal offense for a corporation to hire Chinese or Mongolian employees. California Penal Code § 179 (1880). The California Constitution further provided that "no Chinese shall be employed in any State, county, municipal, or other public work, except in punishment for crime." California Constitution, Art. XIX, § 2 (1879). It was not until 1952 that the people of California repealed Article XIX of their Constitution.

Prior to that the California Legislature had already passed "an act to protect free white labor, and discourage the immigration of the Chinese into the State of California." Law of April 26, 1862 (emphasis added). This legislation placed a special "Chinese Police Tax" on those employing Chinese and Mongolian nationals. Lin Sing v. Washburn, 20 Cal. 534 (1862).

In 1945 the California Legislature

amended the commercial fishing license statute to the effect that persons ineligible for United States citizenship could not obtain commercial fishing licenses. Cal. Stats. 1945, c. 181; Fish & Game Code § 990 (1945). This legislation was held unconstitutional in Takahashi v. Fish & Game Commission 334 U.S. 410, 68 S.Ct. 731 (1948); see also, Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064 (1886).

Bigotry against non-citizens extended to the highest levels of the California judiciary:

> The anomalous spectacle of a distinct people living in our community, recognizing no laws of this State except through necessity, bringing with them their prejudices and national feuds, in which they indulge in open violation of law, whose mendacity is proverbial; a race of people whom nature has marked as inferior, and who are incapable of progress

> or intellectual development beyond a certain point, as their history has shown, differing in language, opinions, color and physical conformation; between whom and ourselves nature has placed an impassable difference, is now presented, and for them is claimed, not only the right to swear away the life of a citizen, but the further privilege of participating with us in administering the affairs of our Government.

People v. Hall, 4 Cal. 399, 404 (1885).

California's history of discrimination against non-citizens again surfaced in 1961, when, "in one fell swoop, the legislature passed Government Code Section 1031 which applied the mandatory citizenship requirement" to a wide list of job categories. J.A. 79-80.

(b) The District Court Properly Considered Appellees Challenge to Government Code Section 1031, As Applied to All "Peace Officers"

Appellants' Opening Brief ("App. Bf.") argues that because appellees were applicants for only one class of position, deputy probation officer, they "lacked standing to assert that Section 1031a was overbroad because it might include some [job] categories. . .[which] may be found not to justify a citizenship restriction." App. Bf. 29.

(i) Scope of Review of the Challenged Statute

In Sugarman this Court examined the full reach of the citizenship restriction enacted by New York and struck down the entire statutory scheme. 413 U.S. at 639. The Court did not limit its inquiry to the particular job sought by the plaintiffs in that case. Ibid. In Foley the Court made clear that a State

may not accomplish a citizenship restriction with a statutory scheme which sweeps indiscriminately "without regard for the differences in the positions involved." 435 U.S. at 296.

Petitioners rely upon United States v. Raines, 362 U.S. 17 (1960) and Broadrick v. Oklahoma, 413 U.S. 601 (1973) in support of their argument that the plaintiffs/appellees lacked standing to challenge the full scope of Section 1031. App. Bf. 25.

First it should be noted that Sugarman was decided on the same day as Broadrick and more than ten years after Raines. Clearly, neither Broadrick nor Raines limited this Court to an examination of only the particular jobs sought by the Sugarman plaintiffs. As noted above, the Court in Sugarman analyzed the entire statutory scheme without regard to the particular jobs sought by the plaintiffs in that

case.[2/]

The plaintiffs in Broadrick challenged a statute on First Amendment vagueness and overbreadth grounds. The challenged statute was concededly constitutional as applied to their conduct and the Court held that they could not challenge the statute on the grounds that it may conceivably be applied in an unconstitutional manner in other situations not before the Court. Here the plaintiffs/appellees challenge California Government Code Section 1031(a) which requires that numerous job categories only be filled by United States citizens. Clearly they have "standing" under Article III of the Constitution of the United States. Baker v. Carr, 369 U.S. 186 (1962).

[2/] The majority in Sugarman considered the constitutionality of the challenged New York statute in its entirety, despite the urgings of Justice Rehnquist in dissent that the examination should be confined to the

The question is not one of standing, but rather whether "good judicial policy" allows plaintiffs to show the full reach of Section 1031(a) as applied to all covered job classifications. Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction, § 3531, p. 205. Should this Court reject amici's suggestion that this case be remanded, sound judicial policy would mitigate in favor of examining the total reach of the challenged statute. Section 1031(a) is one statute, clearly written, and applies to a wide variety of job classifications. The Court should not attempt to artificially divide the statute into component parts in order to save it from a Constitutional challenge.

The prudential requirement that a sta-

2/ Continued: particular jobs sought by the plaintiffs. Sugarman, supra, 413 U.S. at 662 (Rehnquist J. dissenting).

tute be construed so as to avoid deciding constitutional issues, explicated by Justice Brennan in Raines, has no application in this case. Further, the principle that statutes should be construed in favor of constitutionality where possible cannot be applied in this case because Section 1031 (a) is clear on its face and thus leaves no room for a limiting construction. This case is similar to Aptheker v. Secretary of State, 378 U.S. 500 (1964), which involved a statute clear on its face and thus not subject to a saving construction absent a wholesale rewriting of the statute, 378 U.S. at 515-16, a task more appropriately left to the legislature.

The limitation on review suggested by Justice Brennan in Raines was recognized as a court rule and not a constitutional requirement. United States v. Raines, supra, 362 U.S. at 21-22. In fact, in Barrows v. Jackson, 346 U.S. 249 (1953), the case re-

lied upon by Justice Brennan in Raines, the Court entertained a constitutional attack on a judgment enforcing a racially restrictive covenant, over the dissent of the then Chief Justice and despite the fact that the challenge was brought by white persons in behalf of black persons not before the Court. The Court justified its actions in approving such third party standing, a departure from what it referred to as "only a rule of practice", as required by the "need to protect the fundamental rights which would be denied" if the Court refused to act. 346 U.S. at 257. Thus, neither Raines nor Barrows precludes review of Section 1031(a) on its face.

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(ii) The Challenged Statute Unjustifiably Precludes Non-Citizens Employment in Many Job Classifications

Appellees and the district court have already pointed out the numerous job classifications included within the reach of Section 1031(a). Appellees' Brief at 35-42; Chavez-Salido v. Cabell, supra at 80 (June 4, 1980). Amici will briefly examine some of these job classifications to show that they do not involve important governmental functions and are not supported by a compelling state interest.

"[T]oll service employees" must be United States citizens under the challenged statute. Chavez-Salido v. Cabell, supra, at 80 (June 4, 1980). The California State Personnel Board describes the typical tasks of a toll sergeant as follows:

> Acts as desk sergeant on an assigned shift or is respon-

sible for a special phase of the toll collection activities; assists in determining the number of toll stations required to handle traffic effectively during an assigned shift and in directing the opening and closing of stations as needed; assigns Toll Collectors to their stations and directs the taking of relief periods; may assist with collections in emergency situations; intructs new collectors in duties and works with an intructs them at their stations; takes charge in difficult situations and adjusts complaints; makes refunds on commute tickets, accepts checks or makes change on unusually large amounts; issue commute books

to collectors and keeps records on special permits; checks on the speed and accuracy of Toll Collectors; reviews Toll Collector's reports; sees that toll stations are neat and orderly and equipment in proper condition; acts as a peace officer as occasion requires; makes reports.

California State Personnel Board, Specification, Toll Sergeant, Schematic Code C540, Revised January 9, 1959. A toll sergeant, in other words, functions as a supervisor of toll collection activities on state-operated toll bridges.

Inspectors for the California Home Furnishings Bureau are also granted the powers of a peace officer in Section 19206 of the Business and Professions Code:

No person shall interefere with,

> obstruct or otherwise hinder any inspector of the bureau or the department's Division of Investigation in the performance of his duties. The chief, his duties, assistants and all inspectors in performance of their official duties, shall have the same powers, as are possessed by peace officers in this state.

The task of a Home Furnishings Bureau inspector involves inspecting upholstered furniture to insure compliance with California consumer laws. These inspectors conduct "interviews and consult with licenses to determine causes of violations and to encourage compliance . . ." California State Personnel Board, Specification, Schematic Code VW10, revised December 7, 1972. They make inspections at "retailers of

upholstered furniture or bedding or those items containing concealed filling materials. . ." Ibid. They also take "samples [from upholstered furniture in] barber shops and schools. . . cosmetology shops and schools. . . dry cleaning shops and plants. . . [and] fur hat renovators. . ." Ibid.

Also included in the scope of Section 1031(a)'s sweep are various "investigators" designated as "peace officers." California Penal Code Section 830. These include investigators for the Department of Alcoholic Beverage Control Board, the Board of Medical Quality Assurance, the State Division of Forestry, and the California Horse Racing Board. Ibid. These investigators are classified into three categories: (1) Investigator assistant; (2) investigator trainee; (3) special investigator. California State Personnel Board, Classification, Schematic Code VJ25, Revised

March 26, 1975. The "Investigator Assistant", who under Section 1031(a) must be a United States citizen, works "[u]nder close supervision as a learner and worker, to assist with the more routine phases of licensing and enforcement investigations . . ." Ibid. They "assist in determining the character of applicants for specialized licenses by means of interviews. . . [and] inspect premises where licenses are to be located." Ibid.

Public school teachers, who this Court held in Ambach could be required to seek United States citizenship, fulfill " perhaps the most important function of state and local governments. . . [Education] is required in the performance of our most basic public responsibilities. . ." Ambach v. Norwick, supra, 441 U.S. at 78. They are responsible for "inculcating fundamental values necessary to the maintenance of a democratic political

system. . ." Id., 441 U.S. at 77.

State troopers also perform a fundamental government function--enforcement of the criminal justice system. Their duties include "the apprehension of suspected criminals, investigations of suspect conduct, execution of warrants and [they] have powers of search, [and] seizure and arrest without a formal warrant under limited circumstances." Foley v. Connelie, supra, 435 U.S. at 293. This country "entrusts many of its most important policy responsibilities to these officers, the discretionary exercise of which can often more immediately affect the lives of citizens than even the ballot of a voter or the choice of a legislator." Id., 435 U.S. at 297.

In contrast, the job classifications covered by the challenged statute involve very limited and basically ministerial duties. The population they serve is

miniscule compared with teachers or State troopers. And, they are not important symbolic figures. If lawyers, who serve as officers of this nations's courts, may be non-citizens, In Re Griffiths, 413 U.S. 717 (1973), then certainly toll-bridge collectors, furniture inspectors, etc., cannot be required to acquire citizenship as a prerequisite to job eligibility. These positions clearly do not fall within "the basic conception of a political community." Sugarman v. Dougall, 413 U.S. 634, 642 (1973). Section 1031(a) is not "precisely drawn in light of [its] acknowledged purpose." Id., 413 U.S. at 642-43.

Foley and Ambach clearly provide that heightened judicial scrutiny will be applied to a state statute which excludes non-citizens from employment in job classifications which do not fall within the political community. Foley v. Connelie, supra, 435 U.S. at 295-96; Ambach v.

Norwick, supra, 441 U.S. at 74. California has shown no compelling, let alone a rational, justification for excluding non-citizens from such public employment positions as furniture inspectors and toll collectors. App.Bf. 9-23. Appellants address their arguments exclusively to the constitutionality of excluding non-citizens from the position of deputy probation officer. Ibid.

(iii) The Challenged Statute as Applied to Deputy Probation Officers

One of the probation officer's primary duties is to submit a pre-sentencing report to the court for each probationer assigned to the officer. The report must include an evaluation of the case history of the offender, the exact contents of which are dictated by statute. California Penal Code § 1203.10. The report also contains a recommendation for or against probation.

Offenses which preclude an offender from receiving probation are clearly delineated by statute. Id., § 1203. Likewise, juveniles not eligible for probation are decribed by statute. California Welfare and Institutions Code § 628. Because the contents of the report are largely statutory, probation departments increasingly use standardized forms for pre-sentencing reports. Maloney and Raymond, A Standardized Pre-sentence Report, Fed. Prob. 41:2 (June 1977).

A court is not bound in any way by the probation officer's report. Whitcombe v. Yolo County, 141 Cal.Rptr. 189 (1977). California courts refer to use of the report as "informal and optional", People v. Hutson, 221 Cal.App.2d 751, 756 (1963), and failure to consider the report does not deprive the defendant of any substantial right. People v. Journey, 129 Cal.Rptr. 478 (1976).

A probation officer's opportunity for shaping a probationer's attitude toward our nation's institutions is extremely limited. A State study indicated that a California probation officer spends, on an average, less than thirty minutes per month with each probationer. California Board of Corrections, Correctional System Study of Board of Corrections: Probation, at 31 (July 1971). More recent figures indicate that a more accurate assessment is that probation officers spend approximately eleven (11) minutes per month in direct contact with their probationers. Los Angeles County Probation Department Union Fact Sheet, at 1 (June 1981). The 1971 California study was forced to conclude that the minimal amount of time spent in direct contact between the probation officer and the probationer resulted in the probationer's family and job having a much greater influence on rehabilitation than was

attributable to the probation officer. Correctional System Study, supra, at 27. And, that the probation officer in the end plays a "rather insignificant role" in the rehabilitation process. Ibid.

Thus, the position of deputy probation officer for which the plaintiffs/appellees applied is not one which carries with it "broad power over people generally. . ." Foley v. Connelie, supra, 435 U.S. at 298. The population they serve is relatively small, and their personal contact with this population is minimal. Unlike teachers, they do not spend enormous amounts of time molding the attitudes of their probationers. The vast majority of the probation officer's time is spent compiling recommendations for the California courts. And they do not serve as important symbols or models with regards the formation of attitudes toward our democratic institutions.

Deputy probation officers do not fall

within the "political community" as that concept is conceived in Foley and Ambach. The challenged statute, Section 1031(a), therefore should be subjected to strict judicial scrutiny. Appellants have not shown that the challenged statutory scheme is supported by a compelling state interest. Graham v. Richardson, 403 U.S. 365, 376 (1971). They have not even attempted such a showing given their belief that the statute need only be defended as having a rational basis. App.Bf. 9-22. In short, appellants have not show sufficient justification for the sweeping restriction found in California Government Code Section 1031(a).

IV.

CONCLUSION

Amici first urge that this case be remanded for a further factual inquiry into the precise nature of the job classifications involved in this litigation. In the

alternative, amici believes that appellants have failed to carry their burden of showing that Section 1031(a) is supported by a compelling governmental interest in requiring that all "peace officers" be United States citizens. The term "peace officer" does not mean "police" officer or state trooper. In California furniture inspectors and toll-bridge collectors are defined as "peace officers." Without a compelling justification for Section 1031 (a)'s broad citizenship requirement, the statute should be found to violate the Fourteenth Amendment equal protection rights of lawful permanent resident immigrants.

Respectfully Submitted,

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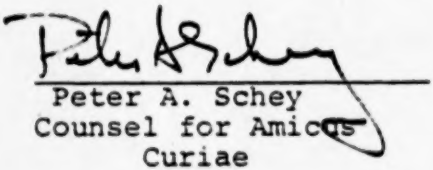

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